

1700626 (Migration) [2018] AATA 5365 (17 December 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1700626
MEMBER:	Justine Clarke
DATE OF ORAL DECISION:	17 December 2018
DATE OF WRITTEN STATEMENT:	4 February 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 04 February 2019 at 5:32pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – spouse of the review applicant – intellectual disability – coerced into the relationship – money transfers – review applicant’s two visits to Afghanistan – family support – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359

Migration Regulations 1994 (Cth), rr 1.09A, 1.15A, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 November 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is [an age] year old national of Afghanistan.
3. On 26 June 2016, the visa applicant applied for the visa on the basis of his relationship with his sponsor, the review applicant. At the time of this decision, the review applicant is [an age] year old Australian citizen.
4. At the time of application, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. The primary criteria include cl.309.211 and cl.309.221.
5. The review applicant provided the Tribunal with a copy of the primary decision. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211. The delegate considered that the information and evidence, submitted in support of the application, was not sufficient to demonstrate that the visa applicant satisfied the definition of spouse under s.5F of the Act. The delegate noted that limited evidence had been submitted in support of the application. Further, the delegate expressed the following specific concerns.
 6. From all the information gather[ed] via telephone it appears that the Sponsor lacked knowledge of her relationship with the Applicant, the Sponsor was not able to answer specific questions as Applicants age and date of birth, living arrangements and wedding. The sponsor appeared very evasive and appeared to be coached by a third party in the background.
 7. In reviewing this application, noting that the Sponsor has an intellectual disability I believe that the Sponsor may have been coerced into the relationship as she was not able to provide her own answers during telephone interview on 13 October 2016. The Department has not been able to contact the Sponsor directly by telephone to further interview her on her relationship with the Applicant.
8. On 11 January 2017, the review applicant applied to the Tribunal for review of the primary decision.
9. On 8 May 2017, the Tribunal wrote to the review applicant, pursuant to s.359(2) of the Act, inviting her to provide further information to support her claims that she and her partner are in a spouse or de facto relationship. The letter included an information sheet, entitled 'Evidence in Partner Cases', which outlined the range of circumstances that the Tribunal is obliged to consider pursuant to r.1.09A (in the case of a de facto relationship) or r.1.15A (in the case of a spouse relationship).
10. On 15 May 2017, the review applicant's representative sought an extension of time in which to provide the information and, on 22 May 2017, the Tribunal wrote to the review applicant (by way of her representative) granting an extension of time until 5 June 2017.
11. On 2 June 2017, within the permitted timeframe, the review applicant provided further information and evidence.

12. On 17 December 2018, the review applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant by telephone from Afghanistan. The hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. The review applicant was represented in relation to the review by her registered migration agent and the agent also attended the hearing.
13. From the evidence before the Tribunal prior to the hearing, particularly the clinical psychological report made in respect of the review applicant [in] October 2017 (Tribunal file ff.25–26), the Tribunal formed the view that the review applicant may be a vulnerable person due to her cognitive impairment. For example, the principal of the special school in [Town 1] which the review applicant had attended gave her opinion, in her letter of 1 May 2017, that:
 14. [The review applicant] presents as a ‘typical’ looking young woman however she has difficulty with long-term memory, times, dates, reading and complex questions and instructions.
15. The Tribunal consulted the Tribunal’s *Migration and Refugee Division Guidelines on Vulnerable Persons* and sought to use the strategies outlined in paragraph 59 to assist the review applicant at the hearing.
16. At the conclusion of the hearing, the Tribunal gave its decision on the review. The Tribunal has concluded that the matter should be remitted for reconsideration. The following are the reasons for that decision.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether, at the time of application, the applicants were spouses for the purposes of the Act. In the circumstances of this case, the Tribunal considers that it is appropriate to also make findings about cl.309.221 as well.

Whether the parties are in a spouse or de facto relationship

18. Clause 309.211(2) and 309.221 require that, at the time the visa application was made and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.
19. The visa applicant claims to be the spouse of the review applicant who is an Australian citizen. A certified copy of the review applicant’s certificate of Australian citizenship is on the Department’s file. On the basis of this evidence, the Tribunal is satisfied that the review applicant is an Australian citizen.
20. ‘Spouse’ is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d).
21. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant’s and review applicant’s household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The review applicant and the visa applicant were married [in] April 2016 in [a named] Village, [in named] District, Afghanistan. A copy of the parties' marriage certificate issued by the Islamic Republic of Afghanistan Supreme Court is on the Department's file. There is nothing in the information before the Tribunal to cast doubt on the validity of the marriage—indeed, the delegate was satisfied that the marriage is valid for the purposes of the Act. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Regulation 1.15A(3) factors

23. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the person's commitment to each other.
24. In assessing these issues, the Tribunal has had regard to all documents on the Department's and the Tribunal's files as well as the oral evidence given at the hearing.
25. The Tribunal notes at the outset that it has had the benefit of more evidence than was available to the delegate at the time of the primary decision. In this review application, the review applicant submitted a number of documents, including: written submissions dated 26 May 2017; the review applicant's signed statement of 14 September 2018 outlining the inception and development of the relationship and requesting priority processing by the Tribunal; a clinical psychological report in respect of the review applicant, made [in] October 2017; a number of flight itineraries; photographs; a signed 'to whom it may concern' letter dated 1 May 2017 by the principal of the special school in [Town 1] which the review applicant had attended and a number of handwritten receipts—not all of which were in English.

26. The financial aspects of the relationship

27. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
28. The Tribunal does not have any evidence that the applicants jointly own real estate or major assets or that they have any joint liabilities. The Tribunal is mindful that, as the parties have lived in different countries for part of their marriage, their opportunities for acquiring joint assets or taking on joint liabilities has not been great.
29. The Tribunal accepts the submission made in the written submissions of 26 May 2017 that there is evidence that one person in the relationship owes a legal obligation in respect of the other. The submissions explained:
30. In applicant's marriage contract, it is clearly mentioned under (Marriage Portion) the amount [the review applicant's] husband owes legally to his wife and it is his duty to pay her in case she asks for it at any given time.

31. Applicant's marriage portion (Mehr) is about [amount] AUD cash plus [number] Iran gold coins (Bahar Azadi). The current value of each gold coin is about

530 AUD, which makes it total of [amount] AUD. The marriage portion acts as an insurance for the wife, in case she is not happy with her marriage and wants to separate from her husband.

32. (The Tribunal notes that documentary evidence was submitted with respect to the value of the coins).
33. While the marriage document does not clearly state which party is responsible for the marriage portion of '[amount] Afghani and One Pace of holy Quran and [number] seka Bahar Azadi', it is probable that it is the husband to the marriage. The Tribunal finds that one party to the marriage owes a legal obligation in respect of the other according to the marriage portion of the marriage registration documentation.
34. The delegate stated that she had no evidence before her pertaining to the financial aspects of the relationship, particularly in respect of any pooling of financial resources and any sharing of day-to-day household expenses. The written submissions were critical of the delegate's finding that there was no evidence of mutual financial commitment. It was submitted:
 35. In his statement provided on 21/10/2016, the spouse of the applicant has clearly stated that he works as [an occupation] and his income is sufficient to financially support his wife and his household needs.
 36. Before leaving Afghanistan, [the review applicant's] mother left [amount] AUD with her daughter in case it was needed and she send her another [amount] AUD few months before [the review applicant's] return to Australia.
 37. ...
 38. On 06/01/2017 [the review applicant] send [amount] AUD to her husband.
39. The Tribunal notes the hand written cash receipt corroborating the final claim.
40. On 10 December 2018, the representative sent a cash receipt to the Tribunal which was said to be 'a receipt of [amount] AUD send by applicant's mother to her husband for her ticket to [Australia]'. The accompanying document is not in English but is dated 22 November 2018 which, the Tribunal notes, is just prior to the review applicant's return from Afghanistan to Australia so that she could attend the Tribunal hearing.
41. At the hearing, the review applicant gave oral evidence that her husband works as [an occupation] for another person's business. She told the Tribunal that she was not working and receives money from Centrelink. She stated that she cannot manage her money so her family assists her to look after her money. She said that when she was living with her husband in Afghanistan that her husband took responsibility for their financial arrangements as she did not understand the Afghani currency. She said that the visa applicant bought things for her and that she did not handle money when they were together. She said that when she is in Australia that her family assists her with the financial aspects of her life and when she is in Afghanistan that it is her husband who does so. She said that, when she has been in Australia, she has sent some money to her husband, including when he has asked her. She told the Tribunal that her mother physically arranges the transfer of the money from Australia to Afghanistan.
42. The visa applicant gave broadly consistent oral evidence, including about his employment, the review applicant's source of income and some of the amounts of money that had been sent to him. While he stated that it had been the review applicant's mother, rather than the

review applicant herself, who had sent him AUD \$[amount], the Tribunal is not concerned by this inconsistent evidence given the arrangements that have been put in place for the review applicant to transfer money to Afghanistan.

43. The Tribunal accepts the parties' oral evidence about the financial aspects of their relationship and notes that there is some, albeit very limited, corroborating documentary evidence. In the circumstances, the Tribunal finds that there has been some pooling of financial resources—including when the parties have been living apart in different countries—and some sharing of day-to-day household expenses, namely when they have been living together.

44. The Tribunal gives some weight to the evidence of the financial aspects of the relationship.

45. *The nature of the household*

46. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.

47. The Tribunal does not have any evidence that either the review applicant or the visa applicant have any children, either together or of their own. There is no evidence of any joint responsibility for the care and support of any children.

48. With respect to the living arrangements of the review applicant and the visa applicant, the evidence before the Tribunal is that the parties first lived together as a couple after their marriage. The applicants gave consistent oral evidence that they lived together in a rented room next door to the visa applicant's mother's house. They lived together until the review applicant returned to Australia [in] November 2016.

49. In her letter requesting priority processing by the Tribunal, dated 14 September 2018, the review applicant explained her reasons for returning to Australia in November 2016 and for later returning to Afghanistan to live with her husband.

50. I was hoping to return to Australia with my husband. But living in Afghanistan was not easy, the ongoing sound of gun fire and bomb explosions was very scary and I don't dare to leave the house. After seven or eight months of waiting I was very home sick and missed my family so I told my husband that I need to go home and I was sure that after a short time he will get his visa and join me in Australia. Unfortunately few days after my arrival in Australia [the visa applicant]'s application was refused due to a misunderstanding of my mental health condition. So in January 2017, I appealed to the Tribunal and waited to go to the hearing to resolve this problem and get my husband's visa. I have waited over a year but because I missed my husband very much I decided to return to him in Afghanistan and wait until the hearing.

51. The review applicant's movement records evidence her as having departed Australia [in] April 2018.

52. The parties gave consistent oral evidence as to living together in the visa applicant's family house during this second period and also about the visa applicant's other family members who lived with them. The Tribunal notes that there are some photographs showing the parties together in domestic settings. Notwithstanding the extremely limited corroborating documentary evidence, the Tribunal accepts the review applicant's and the visa applicant's consistent oral evidence that they lived together in this later period, which the Tribunal

understands was from April 2018 until the review applicant returned to Australia in late 2018 in order to attend the Tribunal hearing on 17 December 2018.

53. The Tribunal also accepts the parties' broadly consistent oral evidence about the responsibility for housework in the periods when they have lived together. For example, the review applicant explained that men in Afghanistan do not undertake housework and that she and her mother-in-law undertook the various tasks.

54. The Tribunal gives weight to the evidence of the nature of the household.

55. *The social aspects of the relationship*

56. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.

57. The Tribunal notes that the written submissions address the delegate's concerns in respect of the social aspects of the relationship. It was submitted that the visa applicant lives in a small community in Afghanistan and that the people there know that the visa applicant and the review applicant are married to one another and living together as husband and wife. It was submitted that the situation in Afghanistan made it difficult for people to attend events, go on holidays and become members of groups in the way that might be possible in other countries. The Tribunal accepts the validity of these submissions.

58. There is evidence before the Tribunal that the review applicant and the visa applicant have represented themselves to various family members and others in their respective communities as being married to each other and some of these people gave their opinion about the nature of the relationship. In this respect, the Tribunal notes and gives weight to the Form 888 statutory declarations made by the review applicant's parents which are on the Department's file. These declarations were made in late May 2016 (in respect of the review applicant's father, [named]) and early June 2016 (in respect of the review applicant's mother, [named]). The Tribunal also notes and gives weight to the signed statement made on 1 May 2017 by [name], the principal of the school where the review applicant had attended. [The principal] stated that the review applicant 'has the capability of participating in a marriage union' and she stated:

59. I have sighted a Marriage Certificate for [the review applicant] from the Islamic Republic of Afghanistan. It states that she married [the visa applicant] [in April 2016]. I have spoken with [the review applicant], when she visited school recently and asked her about her marriage. She explained that she lived with [the visa applicant] for many months in the village and that she was very happy.

60. [The review applicant] has a supportive family network. This network would certainly support the marriage of [the review applicant] and [the visa applicant].

61. The review applicant and the visa applicant gave consistent oral evidence about the social aspects of their relationship. They both told the Tribunal that the security situation in Afghanistan meant that they did not travel for social events but rather most of their time together was spent in the home. That said, the review applicant was adamant that people in the neighbourhood in Afghanistan knew that they were married because they were 'always together'. The visa applicant told the Tribunal that they did not have a large family in Afghanistan so they mainly socialised with neighbours and he mentioned the Eid festival as one social occasion.

62. The Tribunal also notes that the review applicant submitted a number of photographs to the Tribunal of her time in Afghanistan with the visa applicant. The Tribunal notes that some of these photographs showed them with other people and in both domestic and public spaces.

63. In light of the evidence before the Tribunal, the Tribunal finds that there is social and public recognition of the relationship.

64. The Tribunal gives weight to the evidence of the social aspects of the relationship.

65. *The nature of the person's commitment to each other*

66. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the person's commitment to each other.

67. The written submissions of 26 May 2017 also made submissions in respect of the nature of the person's commitment to each other.

68. The evidence before the Tribunal is that the parties have been in an exclusive and committed relationship since marrying [in] April 2016. They are first cousins who first met in person shortly before this time when the review applicant's family visited the visa applicant's family in Afghanistan. As mentioned earlier, the review applicant outlined the inception of the relationship in her letter to the Tribunal requesting priority processing. She gave consistent oral evidence at the hearing about the inception and development of the relationship. The review applicant presented as a young woman very much in love with her husband. The Tribunal found her to be honest and credible and has no cause to suspect that she has been coerced into the relationship, as the delegate feared. At the time of this decision, the parties have been married for well over two and a half years. The Tribunal gives weight to the length of the relationship.

69. The Tribunal also gives weight to the length of time during which the persons have lived together, noting that the review applicant was so keen to live with her husband that on two occasions she elected to live in Afghanistan with him—despite her feeling unsafe and frightened living there—rather than return to the safety of her life in Australia. The Tribunal considers this to be strong evidence of the degree of companionship and emotional support that the persons draw from each other.

70. The review applicant told the Tribunal that her husband had always protected her when she was in Afghanistan. To this end, the visa applicant told the Tribunal that he had accompanied the review applicant from Kabul to Herat on her second trip to the country and there is corroborating documentary evidence in the form of e-tickets for both parties, including for a flight from Herat to Kabul when the review applicant returned to Australia in order to attend the Tribunal hearing.

71. They both told the Tribunal that they saw their relationship as being for the long term and they were able to give their reasons for holding this view. They gave consistent oral evidence that they have maintained regular contact when they have been apart and were able to provide detail about the nature of their conversations. The Tribunal accepts that these frequent and ongoing communications between the parties are indicative of their genuine commitment to the relationship. In light of all the evidence before the Tribunal, the Tribunal finds that the parties see their relationship as long term.

72. The Tribunal has taken into account the parties' respective ages, backgrounds and life experiences and accepts that, at both the time of application and at the time of this decision, neither party was or is in a relationship with any third party.
73. The Tribunal is satisfied, considering all of the evidence cumulatively, that the parties have demonstrated and continue to demonstrate a level of commitment to one another and to their spousal relationship as contemplated in the Regulations.
74. The Tribunal places great weight on the nature of each person's commitment to the other.

75. **CONCLUSION**

76. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s.5F(2)(a) of the Act.
77. For the reasons given with respect to the r.1.15A(3) matters, the Tribunal is satisfied that at both the time of application and at the time of this decision, the review applicant and the visa applicant:
- had and have a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
 - lived together or did not and do not live separately and apart on a permanent basis, as required by s.5F(2)(d)(ii) of the Act.
78. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
79. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
80. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

81. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).